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Sotomayor hard to read on security issues; Two rulings offer few clues

By Tom LoBianco

Supreme Court nominee Sonia Sotomayor remains something of an enigma on legal matters relating to national security and the war on terror, issues likely to loom large on the high court's docket in the coming years.

In one case touching directly on national security questions, Judge Sotomayor ruled for the Bush administration in 2006 in allowing broad search powers to a Vermont ferry operator for security purposes. But in a second case - still pending - she sharply questioned the government's "rendition" policy of shipping suspected terrorists to other countries for questioning.

"I remember my impression was she was competent and not easy to characterize," said William A. Nelson, the Vermont lawyer who lost this case before Judge Sotomayor and other judges on the 2nd U.S. Circuit Court of Appeals.

"I remember her questioning being very detailed, very down-to-earth and very nuts and bolts," Mr. Nelson added. "She read the precedent tilting toward the pro-government stance."

Judge Sotomayor paid a string of courtesy calls Tuesday to key lawmakers on Capitol Hill. Senate Judiciary Committee Chairman Patrick J. Leahy, Vermont Democrat, said confirmation hearings will not start before July but warned that he would move "sooner rather than later" if opponents continue what he called "vicious attacks" on the nominee's views.

Sen. Jeff Sessions of Alabama, the Judiciary Committee's ranking Republican, said after his meeting with Judge Sotomayor that he would like wait until September for the hearings so senators will have time to pore over her lengthy judicial record.

As with the abortion issue, Judge Sotomayor's thin record on national security law has prompted conjecture across the political spectrum about how she would approach cases in this area.

E. Christopher Murray, a New York civil liberties lawyer, said Judge Sotomayor was likely to bolster the Supreme Court bloc that has balked at several Bush administration policies in the war on terror.

"I think she generally has been suspicious of presidential powers and has been concerned with the civil liberties aspect of the war on terror," Mr. Murray said.

"It's a critically important area," said Thomas H. Dupree Jr., who has argued five cases before Judge Sotomayor in the 2nd Circuit. "These challenges are not going away any time soon."

The court's 5-4 vote last year granting terror suspects held at the Guantanamo Bay prison the right to trial underscores the precarious balance of power among the nine justices. On Monday, a federal judge in the District of Columbia ruled that the public should have access to files on Guantanamo

detainees, while the Obama administration faces a separate court fight over its refusal to release photos of U.S. military abuse of prisoners.

A sharply split Supreme Court ruled last June that detainees being held at Guantanamo Bay had a right to sue the government for being held without trial. Justice David H. Souter, whom Judge Sotomayor would replace on the bench if approved, voted with the majority to give the Guantanamo detainees the right to a trial.

"If you start making the wrong decision, it is so much more severe," said Glenn Sulmasy, an associate professor of international and constitutional law at the U.S. Coast Guard Academy. "Those sorts of things make it even more important on the question of where does she stand."

Mr. Sulmasy is urging the Senate to press Judge Sotomayor on a series of national security questions, including whether the campaign against al Qaeda should be treated legally as a war and whether to maintain or modify military commissions to try suspected terrorists.

He said Judge Sotomayor showed deference to the Bush administration in her 2006 ruling in the Vermont ferry case, but that it was hard to glean any trends from such a sparse record.

One reason for Judge Sotomayor's relatively thin record on national security issues is that most such cases are heard in the U.S. Circuit Court of Appeals for the District of Columbia, Mr. Sulmasy said, not the New York-based circuit where Judge Sotomayor serves.

Unlike in the 2006 Vermont case, Judge Sotomayor appeared to be leaning against the executive branch in a case that came before the 2nd U.S. Circuit Court this year.

During a hearing in the case of a Canadian man detained by U.S. authorities and shipped to Syria without trial, Judge Sotomayor had sharp questions for the Bush administration attorneys arguing the case.

"Certainly based on her questions, she did not take an expansive view of executive power," Mr. Dupree said. "Of course, you can never be sure based on a judge's questions how they're going to rule."

The 2008 case, involving the military practice of rendition, has not been decided.